IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941.

No.

LIONEL A. GOUDEAU,
Petitioner and Appellant below,

versus

AMELIE DAIGLE, WIDOW OF PAUL J. LeBLANC, ET AL.,
Respondents and Appellees below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the Eastern District of Louisiana, has been officially reported in 37 Fed. Sup. 843.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, has been officially reported in

124 Fed. 2d 656. Rehearing was duly applied for and denied by the Circuit Court of Appeals for the Fifth Circuit on February 2, 1942.

JURISDICTION.

The jurisdiction of the Supreme Court to review the judgment of the Circuit Court of Appeals by writ of certiorari is sustained by the United States Judicial Code, Section 240 (28 U. S. C. A., Section 347). Rehearing was denied by the Circuit Court of Appeals for the Fifth Circuit on February 2, 1942. (See *Goudeau vs. Daigle, et al.*, 124 Fed. 2d 656.) This petition will be filed on or before May 1, 1942.

The jurisdiction of the District Court was based upon diversity of citizenship, the complainant being a citizen of the State of Texas and the defendants being citizens of the State of Louisiana; and upon the amount in controversy being in excess of Three Thousand Dollars, exclusive of interest and costs. The statutory authority for this jurisdiction is the United States Judicial Code, Section 24 (28 U. S. C. A., Section 41 (1)). Jurisdiction of the Circuit Court of Appeals was based upon the United States Judicial Code, Section 128 (28 U. S. C. A., Section 225).

STATEMENT OF THE CASE.

This proceeding originated by suit in the United States District Court for the Eastern District of Louisiana, brought

by Lionel A. Goudeau upon a written contract for the sale of land situated in St. Mary Parish, Louisiana, which contract was executed in the State of Louisiana, for specific performance of said contract claimed by Goudeau as purchaser thereunder, or in the alternative for damages. (See Record, pp. 5-7.) The defendants are the widow and heirs, and the alleged assignee of a fractional interest in the land, of Paul J. LeBlanc, the vendor.

The District Court granted a motion to dismiss plaintiff's action, filed by defendants. Meanwhile, a supplemental petition had been ordered filed without objection. The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Fifth Circuit which denied an application for a rehearing on its judgment. None of the defendants filed any plea of laches.

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in failing to give the proper legal effect to the suspensive condition in the contract by which Paul LeBlanc agreed to sell land located in Louisiana, said contract having been executed in that State; and particularly erred in failing to hold that the nonfulfillment of the obligation of the seller to furnish an abstract of title to the purchaser, which obligation the Circuit Court of Appeals correctly recognized constituted a suspensive condition, relieved the purchaser from paying the balance of the purchase price or making legal tender thereof or performing any other obligation imposed upon such purchaser, until the seller would have satisfied the suspensive condition.

(2) The Circuit Court of Appeals erred in failing to hold that the terms of a Louisiana contract of sale relating to the time of payment of the balance of the purchase price thereunder constitute an accidental stipulation, subject to modification by the will or action of the parties without changing the character of the contract or destroying its effect; and particularly erred in failing to hold that the nonfulfillment by LeBlanc and his successors in title of the suspensive condition imposed upon them, extended the time of payment, by suspending Goudeau's obligation to pay the balance of the purchase price, and that consequently this suit has been brought in time.

(3) The Circuit Court of Appeals erred in holding that Goudeau is not entitled to specific performance of his contract to purchase land located in Louisiana under a contract of sale made under the laws of that State; and particularly erred in failing to apply Article 2462 of the Revised Civil Code of Louisiana and, by applying said Article, to recognize and enforce Goudeau's right to a specific performance.

(4) The Circuit Court of Appeals erred in holding that the granting of specific performance by the courts in this case is a matter within judicial discretion; and particularly erred in failing to apply so as to grant specific performance to the purchaser, the law between the parties contained in the contract itself, which contract expressly reserves to either party the right to specific performance.

(5) The Circuit Court of Appeals erred in affirming the dismissal of the complaint herein by the District Court on the basis of laches, where no affirmative plea of laches has been filed by the defendants.

ARGUMENT.

The Circuit Court of Appeals has rendered an opinion and decree irreconcilable and in conflict with the pertinent provisions of Louisiana law and the jurisprudence, both state and federal, interpreting those provisions. The Circuit Court correctly held that the duty of LeBlanc to furnish an abstract was a suspensive condition, but did not give proper legal effect to the principle of law enunciated. Its decision has thus relieved LeBlanc and his successors in title, the defendants herein, from the obligations resulting from the suspensive condition made a part of his contract with Goudeau, and has destroyed the rights of Goudeau under the suspensive condition plainly written therein.

The suspensive condition is defined by statute in Louisiana, (Revised Civil Code of 1870, Article 2043), and its effect is stated as follows:

> "The obligation contracted on a suspensive condition is that which depends, either on a future and uncertain event, or on an event which has actually taken place, without its being yet known to the parties.
>
> "In the former case, the obligation can not be executed till after the event; in the latter, the obligation has its effect from the day on which it was contracted, but it can not be enforced until the event be known."

The effect of a suspensive condition is also clearly stated in another way, in Article 158 of the Louisiana Code of Practice, which Article reads as follows:

> "When the demand is premature, that is to say, when the action has been brought before the debt

had become due, the suit must be dismissed, leaving to the party his right to bring his action in due time.

"The same rule must be observed if the object due be demanded out of the place where it was to have been delivered, or if the obligation be conditional, and its execution be demanded before the condition has been fulfilled."

The two provisions of Louisiana Statutory Law just quoted show that, once the Circuit Court decided that the obligation of LeBlanc to furnish the abstract constituted a suspensive condition, it was the duty of that Court to hold further that Goudeau's obligation to pay the balance of the purchase price could not be executed till after the "event", that is, until after the satisfying of the suspensive condition.

That portion of the contract of sale which stated that payment of the balance of the purchase price might be deferred until Goudeau could collect a certain judgment "but (the balance of the price) not to be paid later than December 1st, 1932", like all the other obligations of the contract would be performed *after* the satisfying of the suspensive condition of furnishing an abstract imposed upon the vendor. Also, as the very term "suspensive condition" should have led the Circuit Court of Appeals to realize the obligation to pay the balance of the price was suspended till the satisfying of the condition to furnish the abstract.

In fact, the time fixed for payment by Goudeau falls under the definition of accidental stipulation contained in the Revised Civil Code of Louisiana. Article 1764 of that

Code classifies the stipulations of a contract as being:—(1) of the essence of the contract, for the want whereof there is either no contract at all or a contract of another description; (2) of the nature of the contract, being implied from its nature if no stipulation be made respecting such elements, but which the parties may expressly modify or renounce without destroying the contract or changing its description; (3) accidental stipulations, which belong neither to the essence nor the nature of the contract, but depend solely on the will of the parties. This very Article of the Revised Civil Code of Louisiana (1764) goes on to say, "The term given for the payment of a loan, the place at which it is to be paid, and the nature of the rent payable on a lease, are examples of accidental stipulations." Thus, the term given for the payment of a purchase price would also clearly fall under the classification of accidental stipulations of a contract. How could it be said that those obligated to fulfill a suspensive condition, correctly recognized by the Circuit Court of Appeals as such, may rightfully avail themselves of their delay to contend that an accidental stipulation fixing the term of payment by the opposite party has not been carried out?

The decision of the Circuit Court of Appeals in holding that payment by Goudeau "could not be made after December 1st, 1932", not only does violence to the language of the contract between him and LeBlanc and to the clear intent of the parties, but also to the character of the stipulation as an accidental stipulation, and to the effect of the vendor's non-fulfillment of the suspensive condition to furnish an abstract. It was obviously not the intention of the parties that the purchaser should have to pay the

balance of the price unless and until the abstract should first be furnished him and he should have a reasonable opportunity to examine it and find the title good or curable within a reasonable time and at a reasonable expense, and should also be given the further time necessary to have it cured at the seller's expense.

In other words, the Circuit Court of Appeals has erred in not holding that the date stated by which the parties originally stipulated or covenanted that the balance of the purchase price should be paid, namely December 1st, 1932, was the time by which the vendor, or his successors in title, could rightfuly have insisted that such balance be placed in their hands upon their giving a deed, provided that they themselves had furnished the abstract of title within a sufficient period prior to December 1st, 1932, for the purchaser to have examined same and found the title valid or curable prior to December 1st, 1932. But, admittedly, neither the vendor nor his successors in title, have fulfilled their obligation of satisfying the suspensive condition; and therefore the Circuit Court of Appeals has erred to the extent of destroying the statutory effect of the suspensive condition even after it has correctly recognized its nature.

In refusing to grant specific performance of a contract of sale of immovable property situated in Louisiana, the Circuit Court of Appeals has erroneously conceived that it is within its province to refuse to grant such a remedy. It has done so directly in the teeth of the plainly written language of Louisiana Statutory Law. Article 2462 of the Revised Civil Code of 1870 declares the right to specific

performance of a contract of sale of immovable property in no uncertain terms. This Article, as amended (the last amendment being by Act 27 of 1920), reads as follows:

> "A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and terms, and which, if it relates to immovables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same.
>
> "One may purchase the right, or option to accept or reject, within a stipulated time, an offer or promise to sell, after the purchase of such option, for any consideration therein stipulated, such offer, or promise can not be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract or agreement to sell, evidenced by such promise and acceptance, may be specifically enforced by either party."

We have already pointed out above that the action of the Circuit Court of Appeals in refusing to give the proper legal effect to the suspensive condition which it found to be present in the contract of sale of immovable property entered into between Goudeau and LeBlanc violates the statutory provisions of Louisiana law. It is also contrary to the jurisprudence on the subject established by the Louisiana Supreme Court.

In the case of *Morgan and Lindsey vs. Ellis Variety Stores*, 168 La. 1073, 123 So. 717, Morgan and Lindsey agreed to buy from Ellis Variety Stores certain movable property and leaseholds and the latter agreed to sell the property in question for a price fixed by the agreement.

However, the contract contained provisions by which the seller agreed to comply with the provisions of Act 270 of 1926 of the Louisiana Legislature on the subject of bulk sales. The Supreme Court of Louisiana held that the failure to comply with this condition, which the Court held to be a suspensive condition, prevented the obligation of Morgan and Lindsey to pay the purchase price from arising. The following language from the opinion (168 La. 1078) is particularly in point here:

> ". . . **The performance of all of the requirements of Act 270 of 1926** was a **condition precedent** (suspensive condition) to the obligation of the plaintiff to pay the price, **and since the requirements of said Act were not complied with** . . . the obligation to pay the price never arose or came into existence." (Emphasis by the Court.)

In *Cornell vs. Hope Insurance Company,* 3 Mart. (N. S.) 223, decided in 1825, the Supreme Court of Louisiana held that certain provisions requiring notice and proof of loss within specified periods of time contained in a fire insurance policy were suspensive conditions or conditions precedent. The Court recognized the existence and applicability of such conditions in Louisiana and stated their effect in the following language (3 Mart. (N. S.) 226, 227):

> "There is not the slightest foundation for the argument, that conditions precedent are unknown to our law. They are recognized and provided for by our system of jurisprudence, and by every other that has in view the ordinary transactions of men. The obligation is conditional, when it depends on a future or uncertain event, says our code. The event then

> must be shown, to make the obligation binding on the party against whom it is presented. For until it takes place, he is not bound to perform what he has promised."

Applying to the case now under consideration, what was well said by the Louisiana Supreme Court in the quotation given above, the event (that is, the furnishing of the abstract by LeBlanc or his successors in title) must be shown to make the obligation (of Goudeau to pay the purchase price by any particular time short of the period of prescription) binding on the party against whom it is presented. Using the language of the Court further, until it (the satisfying of the suspensive condition resulting from LeBlanc's obligation to furnish the abstract) takes place, he (Goudeau) is not bound to perform what he has promised.

In *Gilmore vs. Logan,* 30 La. Ann. 1276, the Supreme Court of Louisiana considered an obligation in writing on the part of the defendant to pay the plaintiffs, as attorneys at law, a certain sum of money for their services in a particular matter when lands referred to in the agreement should have been restored to a group of heirs of whom the defendant was one. The Supreme Court overruled the judgment of the trial court, sustaining a plea of prescription (statute of limitations) of three years, and held as follows as to the true nature of the obligation (30 La. Ann. 1278):

> "This is an absolute promise to pay a specific sum of money upon the happening of a certain event—and is barred only by ten years under C. C. art. 3544."

In *DaPonte vs. Ogden, et al.*, 161 La. 378, 108 So. 777, the Louisiana Supreme Court held the suit to be a mixed action, partaking in its nature of the character of both a real and personal action; that insofar as the suit sought to recover an undivided interest in lands and to compel the defendants to execute title, it was a real action, and insofar as it called on defendants to account for and pay over a certain fraction of royalties realized from said lands, it was a personal action. The two different prescriptions (provisions of the statute of limitations as contained in Louisiana law) which the Court applied to the action were: (1) the prescription of thirty years provided by article 3548 of the Revised Civil Code as to actions for immovable property; (2) the prescription of ten years provided by article 3544 of the Civil Code for personal actions not having any other specified period of prescription.

We have cited these last two cases to stress the point that Goudeau's rights as purchaser under the contract for the sale of an immovable entered into by him with LeBlanc as seller can not be defeated by the non-fulfillment of an obligation containing a suspensive condition the performance of which rested on LeBlanc and his successors in title, it lasts until the passage of at least ten years from the date fixed as the commencement of the running of prescription. We do not even urge that the thirty-year prescription should be applied, although that might be inferred from the last case cited. The present suit was filed in the District Court for the Eastern District of Louisiana on December 10, 1940, within less than ten years even from the date of the written contract of sale

of the immovable property entered into between Goudeau and LeBlanc, that is, from November 17, 1931.

The last paragraph of the opinion of the Circuit Court of Appeals, referring to the denial to plaintiff of his right of specific performance by the United States District Court for the Eastern District of Louisiana, is illustrative of the utter failure of the Court of Appeals to apply either the Louisiana statutory law or its jurisprudence to the issues presented. The paragraph which we complain of reads as follows:

> "Neither may the denial of specific performance be reversed. This remedy is not favored in Louisiana law, and cannot be claimed as an absolute right. The refusal to decree specific performance was in the exercise of the sound discretion of the court below, and the judgment appealed from is
>
> AFFIRMED."

In *Lehman vs. Rice*, 118 La. 975, 43 So. 639, the Supreme Court considered the effect of a written contract for the sale of lands situated in Louisiana where there had been a payment made on account of the purchase price at the time the contract was entered into. That Court held that a promise of sale amounts to a sale in the sense that it gives the purchaser the right to demand a specific performance of the obligation to transfer and deliver the property. The opinion shows that the decision is based on several prior authorities.

The same case is authority for the proposition that a promise of sale duly accepted and recorded confers a real right on the purchaser, of which third persons are bound

to take notice, and such rights can not be defeated by a subsequent sale of the same property recorded prior to the execution of the deed pursuant to the promise of sale.

In *Girault vs. Feucht*, 117 La. 276, 41 So. 572, one of the cases relied upon in the decision of *Lehman vs. Rice, supra*, the Supreme Court of Louisiana also held that a promise of sale of land in Louisiana so far amounts to a sale that specific performance of it will be enforced. To support this view, it cited Articles 2462, 2439 and 2440 of the Louisiana Revised Civil Code of 1870, and also discussed the interpretation of the French courts and law writers upon the effect of the article of the Code Napoleon corresponding to Article 2462 of the Louisiana Civil Code. After referring to the conclusion of the French authorities to the effect that a valid agreement of sale of immovable property so far amounts to a sale as to transfer the ownership of those things sold to the purchaser under the Code Napoleon, the opinion of the Louisiana Supreme Court continues as follows (117 La. 284, 285):

> "Examination of these authorities shows that this conclusion results from the combined effect of the two codal provisions, viz., that the contract of sale is perfect as between the parties by mere consent, and that the parties may by their contract make a law for themselves in everything not contrary to public policy or good morals.
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> "Our own decisions on the subject, in addition to those already referred to, are: McDonald v. Aubert, 17 La. 448; Thompson v. Mylne, 11 Rob. 349; Barrett v. His Creditors, 12 Rob. 474; Stephens v. Chamberlin, 5 La. Ann. 656; Peck v. Overton, 7 La. Ann. 70; Thompson v. Mylne, 6 La. Ann. 80; Peck v. Bemiss, 10

La. Ann. 160; Knox v. Payne, 13 La. Ann. 361; Garrett v. Crooks, 15 La. Ann. 483; Foreman v. Saxon, 30 La. Ann. 1117; Broadwell v. Sheriff, 34 La. Ann. 677; Thompson v. Sheriff, 40 La. Ann. 712, 5 South. 58; Collins v. Desmaret, 45 La. Ann. 108, 12 South. 121.

"Whatever may be the result of these decisions, in so far as concerns the effect of a promise of sale in transferring the ownership, certain it is that they are absolute and conclusive on the question of whether the proper action on such a promise is for damages or for specific performance. Thus, in McDonald v. Aubert, 17 La. 450, the court said:

> " 'We understand article 2437 (2462) to mean that a promise to sell is so far a sale that it gives to either party a right to claim, recta via, the delivery of the thing.'

"And in the leading case of Peck v. Bemiss, 10 La. Ann. 160, where the effect of article 2462 was elaborately considered, the court said:

> " 'The antecedent history of the jurisprudence of France, from whose Code we have taken this article, and which is luminously considered by Marcade, is a satisfactory key to the true meaning of the expression: "La promesse de vendre vaut vente." It seems to have been dictated by a desire to put at rest the question which had divided learned minds, whether a promise of sale created such an obligation as entitled the promisee to an action for specific performance, or simply an action for damages. It is in this sense the Code speaks, as we think that author has justly remarked: "La promesse de vendre vaut vente, c'est a tire, oblige a passer le contra." '

"And in Collins v. Desmaret, 45 La. Ann. 108, 114, 12 South. 121, the Court, speaking of the promise of sale, said:

" 'It produces only such an obligation as may be specifically enforced, but does not absolutely convey the property, or confer upon the promisor the rights of vendor,' "

Not only has the right to specific performance, the principal demand by Goudeau in this suit, been conferred by the provisions of Louisiana statutory law and jurisprudence applicable to the contract that LeBlanc entered into with him, but it has also been made the law between the parties by the express agreement contained therein which has reserved to both Goudeau and LeBlanc the right to enforce specific performance of their respective obligations. Louisiana Civil Code, Articles 1901, 1907, 1945, 1936, 2037; *White vs. Hart, et al.*, 13 Wall. 646.

The Supreme Court of the United States has itself recognized and defined, correctly, the meaning and effect of a suspensive condition under the statutory law of Louisiana (Revised Civil Code) in the case of *City of New Orleans vs. Texas & Pacific Railway Company*, 171 U. S. 312, 43 L. Ed. 178, 18 S. Ct. 875. In that case this Court considered the effect to be given an ordinance of the City of New Orleans giving the right to the railway company to extend its railroad tracks from a depot at a designated terminus in said city to certain other points, in consideration of the obligation of the railway company to establish its terminus at the place designated.

It held that a provision in the ordinance that certain rights were granted to the railway company on condition of its establishing a terminus at a certain point constituted a suspensive condition, and that the obligation of the city to grant the right was conditioned upon the railway company establishing its terminus.

The careful observance of Louisiana law and jurisprudence by this Court in the case cited is illustrated in the following excerpt from the opinion (171 U. S. 333, 334):

> "In Cornell v. Insurance Co., 3 Mart. (N. S.) 223, 226, the supreme court of Louisiana said, in respect of conditions precedent:
>
> " 'They are recognized and provided for by our system of jurisprudence, and by every other that has in view the ordinary transactions of men. The obligation is conditional, when it depends on a future or uncertain event, says our Code. The event, then, must be shown to make the obligation binding on the party against whom it is presented: for, until it takes place, he is not bound to perform what he has promised. Civ. Code, p. 272, art. 68. There is an exception to this rule in regard to the dissolving condition. But in relation to all others it is true, and it is a matter of no moment whether we say the obligation is suspended until the condition is performed, or that the performance of the condition must precede the execution of the obligation. Civ. Code, p. 274, art. 81, and 3; Toullier, Droit Civ. Francaise, liv. 3, tit. 3, c. 4, No. 472; Pothier, Traite des Ob., No. 202.'

> " 'The effect of a suspensive condition, as its name necessarily implies, is to suspend the obligation until the condition is accomplished or considered as accomplished. Till then nothing is due. There is only an expectation that what is undertaken will be due. Pendente conditione nondum debetur, sed spes est debitum iri.' Pothier, Traite des Ob. 218.
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> "The suspensive condition, under the Louisiana Code, is the equivalent of the condition precedent at common law."

Also, it was well said further by this Court (171 U. S. 343):

> ". . . It is not to be doubted that the rule is that contracts are not to be so violently construed as to destroy rights in consequence of suspensive conditions, but it is also equally obvious that they are not to be so interpreted as to relieve one of the parties to a contract from the obligations resulting therefrom, and thereby destroy the suspensive condition plainly written therein . . ."

There has never been any reversal or restriction on the decision of *City of New Orleans vs. Texas & Pacific Railway Company, supra,* although that case has been cited in the Federal Courts.

Paraphrasing the language last quoted, we submit that it is not to be doubted that the rule is that the contract between Goudeau and LeBlanc is not to be so violently construed as to destroy the right of Goudeau resulting in consequence of the non-fulfillment of the suspensive con-

dition. By the effect of the condition, LeBlanc was under the obligation of furnishing the abstract before Goudeau's obligation to pay the purchase price could be made absolute.

We further submit, to continue our paraphrasing, that it is also equally obvious that the suspensive condition referred to is not to be interpreted so as to relieve LeBlanc, or his successors in title, from the obligations resulting therefrom and to permit them by their own failure to perform the obligation of furnishing the abstract, to destroy the suspensive condition plainly written into the contract to which LeBlanc signified his consent by signing the same.

The Circuit Court of Appeals has, in another striking particular, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 8 (c) of the New Federal Rules of Civil Procedure requires an affirmative plea of laches for the question of laches to be before the court for consideration. The record, as will appear from the transcript filed herewith, contains no plea of laches. Yet the transcript will also show that the Circuit Court of Appeals has erred by affirming the decision of the District Court which dismissed plaintiff's petition on the ground of laches.

We respectfully urge, therefore, that a writ of certiorari be issued to review the decision of the Circuit Court of Appeals and to correct the manifest errors therein.

Dated May 1, 1942.

Respectfully submitted,

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